83-1156

No. _____

In The
Supreme Court of the United States
October Term 1983

JOHN R. WILSON, et al.,

Cross-Petitioner,

vs.

UNITED STATES OF AMERICA and
THE OMAHA INDIAN TRIBE

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether Title 25, U.S. Code §194, which places the burden of proof on the "white person" in a suit by "an Indian" over title to property, is unconstitutional because it is invidious racial discrimination in favor of Indians and Indian Tribes, and against other persons in violation of the due process clause of the Fifth Amendment.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the courts below are: The United States of America and the Omaha Indian Tribe, who were the plaintiffs, and John R. Wilson (the personal representative of Roy Tibbals Wilson, now deceased), Charles E. Lakin, Florence Lakin, Harold Jackson, RGP, Inc., and Otis Peterson, who were defendants and who are the cross-petitioners herein. Other defendants in the proceedings below are Darrell L. Sorenson, Harold Sorenson, Harold M. Sorenson, Luea Sorenson, Travelers Insurance Company, The State of Iowa, and the State Conservation Commission of the State of Iowa.

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John R. Wilson, Charles E. Lakin, Florence Lakin, Harold Jackson, RGP, Inc. and Otis Peterson, who are respondents as to the Petition of the United States in No. 83-952, cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion and judgment of the court of appeals is reproduced as Appendix A, B, C and D to the Petition of the United States in No. 83-952. The opinion is reported as *United States v. Wilson,* 707 F.2d 304, as modified on rehearing, 707 F.2d 311 (8th Cir. 1983). The most recent memorandum and order of the district court is reported as *United States v. Wilson,* 523 F.Supp. 874 (N.D. Iowa 1981). Other opinions in this case, in chronological order, are: *United States v. Wilson,* 433 F.Supp. 57 and 433 F.Supp. 67 (N.D. Iowa 1977), vacated and remanded *sub nom. Omaha Indian Tribe v. Wilson,* 575 F.2d 620 (8th Cir. 1978), vacated and remanded, *Wilson v. Omaha Indian Tribe,* 442 U.S. 653 (1979); remanded to district court, *Omaha Indian Tribe v. Wilson,* 614 F.2d 1153 (8th Cir.), cert. denied, 449 U.S. 825 (1980).

JURISDICTION

On December 8, 1983 the United States filed a timely Petition For a Writ of Certiorari in No. 83-952 asking for review of the judgment of the court of appeals entered on June 10, 1983. The United States invoked the jurisdiction of this Court under 28 USC §1254(1). The cross-petitioners received the Petition on December 12, 1983. This Cross-Petition is filed pursuant to Rule 19.5 of the Rules of The Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Code, Title 25 §194. *Trial of right of property; burden of proof.*

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R.S. §2126.

Derivation. Act of June 30, 1834, C.161, §22, 4 Stat. 733.

United States Constitution, Amendment V, Due Process Clause.

> No person shall . . . be deprived of life, liberty or property, without due process of law;

———o———

STATEMENT OF THE CASE

This case is a consolidation of suits brought by the Omaha Indian Tribe and the United States as trustee for that Tribe, to quiet title to certain Iowa farm land as being part of the Omaha Indian Reservation, which was established on the Nebraska side of the Missouri River pursuant to a treaty of 1854.

The complaint of the Tribe invoked the jurisdiction of the district court under 28 USC §§1331 and 1362. The complaint of the United States invoked the jurisdiction of the district court under 28 USC §1345.

The critical factual issue in the case was whether the Missouri River moved over an area, referred to as the

Barrett Survey, in an avulsive or accretive manner at various times since 1854. If the movements were avulsive in nature the original reservation boundaries would remain unchanged and the United States and the Tribe would prevail. If the movements were accretive, the land in question would be Iowa riparian land; it would not be a part of the reservation; and the defendants would prevail. The district court, applying normal burden of proof requirements, placed the burden of proof on the United States and the Tribe; found the movements to be accretive; and held for the defendants, cross-petitioners herein.[1] The Eighth Circuit Court of Appeals held that 25 USC §194 applied to place the burden of proof on the defendants and reversed.[2]

This case was previously before this Court pursuant to its grant, on November 13, 1978, of the Petition for Certiorari of cross-petitioners Wilson, et al., (No. 78-160) limited to two questions presented by that petition which were:

> Whether the Eighth Circuit erroneously construed Title 25 USC §194 to make it applicable in this case.
>
> Whether the Eighth Circuit erred in holding that Federal and not state common law with regard to accretion and avulsion is applicable in this case.

The Court did not grant certiorari on the question of the constitutionality of 25 USC §194 presented in the petition of defendants RGP, Inc. and Otis Peterson in No. 78-162.

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1. *United States* v. *Wilson*, 433 F.Supp. 57 and 433 F.Supp. 67 (N.D. Iowa 1977).

2. *Omaha Indian Tribe* v. *Wilson*, 575 F.2d 620 (8th Cir. 1978).

In its opinion in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), this Court construed 25 USC §194 to be applicable to place the burden of proof upon the defendants in this case, except for the State of Iowa to which the Court held section 194 would not apply; found federal law of accretion and avulsion was controlling, but that the law of Nebraska should be borrowed as the federal rule of decision in this case; and remanded this case to the court of appeals to consider whether the district court had correctly interpreted Nebraska law and had properly applied it to the facts in this case.

The court of appeals on remand again vacated the judgment of the district court, which had quieted title in defendants, and remanded the case to that court with directions to enter judgment quieting title to the trust lands involved, except those claimed by the State of Iowa, in the United States, as trustee for the Omaha Tribe.[3]

On remand the district court, on September 8, 1981, entered a Memorandum Opinion and Order quieting title in the United States and the Tribe and ruling adversely to cross-petitioners on issues raised by them concerning the title status of certain lands within the Barrett Survey which had been patented in fee and the entitlement of cross-petitioners to reimbursement for improvements made to the land.[4]

On appeal to the Eighth Circuit the cross-petitioners, in addition to appealing from the adverse rulings on the

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3. *Omaha Indian Tribe v. Wilson*, 614 F.2d 1153 (8th Cir. 1980) cert. denied 449 U.S. 825 (1980).

4. *United States v. Wilson*, 523 F.Supp. 874 (N.D. Iowa 1981).

fee patent land and improvement issues, raised the issue of the constitutionality of 25 USC §194, the application of which was a determinative factor in the adverse ruling on the issue of ownership of the entire land in controversy. The court of appeals reversed on the issues of fee patent land and improvements and remanded the case once again to the district court for further proceedings but made no ruling on the issue of the constitutionality of 25 USC §194.[5]

The United States in No. 83-952 has petitioned for a writ of certiorari with respect to the ruling of the court of appeals on the improvements issue. The cross-petitioners in this cross-petition seek a writ of certiorari to the Eighth Circuit on the question of the constitutionality of 25 USC §194.

REASONS FOR GRANTING THE CROSS-PETITION

The decisive impact of 25 USC §194 on this litigation has been noted by both the district court and the court of appeals.[6] Although section 194, which allocates the bur-

5. *United States v. Wilson*, 707 F.2d 304, as modified on rehearing, 707 F.2d 311 (8th Cir. 1983).

6. The court of appeals stated: "We recognize that to require the defendants to prove the cause of the river's movements occurring some 100 years after the event is indeed an onerous burden. *Omaha Indian Tribe v. Wilson*, 575 F.2d 620, 651. The district court observed:

> There can be no doubt, however, that 25 USC §194 has been a determinative factor in the outcome of this

(Continued on following page)

den of proof based upon race, would seem almost to compel a thorough constitutional review, the constitutionality of that statute has received only slight attention in this case. In a footnote to the first opinion of the court of appeals, the constitutional question was dismissed with a brief reference to this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974).[7] The court of appeals, though asked to consider this issue in the most recent appeal, failed even to mention it.

The potentially enormous impact of section 194 in future cases involving Indian land claims should be appar-

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(Continued from previous page)

case. In the Appellate stages of this proceeding, this previously untested statute operated to shift the ordinary burden of proof in a quiet title action to the individual defendants. This enormous burden included the task of describing the nature of river movements which occurred beginning over 100 years ago.

United States v. Wilson, 523 F.Supp. 874, fn. 19.

7. In footnote 18 to its opinion in *Omaha Indian Tribe v. Wilson*, 575 F.2d 620, 631 (1980) the court of appeals said:

> The defendants question the constitutionality of 25 USC §194. In discussing the validity of laws granting special treatment to Indians the Supreme Court emphasized in *Morton v. Mancari*, 417 U.S. 535, 554-55, 94 S.Ct. 2474, 2485, 41 L.Ed.2d 290 (1974), that:
>
> On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. This unique legal status is of long standing and its sources are diverse. As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.
>
> (citations omitted).

The defendants, it should be noted, did not raise the constitutional issue on the first appeal since they were appellees, having obtained a judgment from the district court dismissing the plaintiffs' quiet title actions.

ent. The reversal of the burden of proof in such cases will be triggered under the statute whenever the Indian or Indian tribe, or the United States as its "champion", demonstrates that it was "once in possession of or had title to the area in dispute".[8] As the circumstances of this case demonstrate, the remoteness in time of the last Indian possession is immaterial. Any tribal possession in the instant case ceased at least by 1912. With respect to much of the land within the Barrett Survey, it ceased even before that as the Missouri River moved back and forth across that area in the latter part of the 19th century.

The reversal of the normal burden of proof requirements coupled with the inability of defendants in cases such as this to rely upon statute of limitations or laches defenses[9], creates almost insurmountable obstacles to the defense of Indian land claims brought by the tribes or the United States. When the full resources of the United States government are brought to bear on behalf of the Indian claimants, as they have been in this case, the burden is overwhelming.

The instant case demonstrates exactly the consequences of a combination of these forces. The ultimate conclusion of the court of appeals, it may safely be said,

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8. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 668.

9. The federal courts have consistently held that limitations defenses cannot be asserted against Indian land claims brought by tribes or the United States. See, e. g., *United States v. 7,504.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938); *Oneida Indian Nation of New York v. County of Oneida*, 434 F.Supp. 527 (N.D. N.Y. 1977); *Schaghticoke v. Kent School Corp.*, 423 F.Supp. 780 (D. Conn. 1976); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Co.*, 418 F.Supp. 798 (D. Rhode Island 1976).

is that neither side in this litigation has been able to convincingly demonstrate the nature of the river movements occurring almost a century ago which are critical to this case. The evidence on both sides has necessarily involved the "educated guesses" of expert witnesses which the court of appeals has found to be speculative and not sufficient to sustain a burden of proof.[10] Nevertheless, because section 194 automatically places the burden of proof on the defendants, the result is that the United States and the Tribe are now in a position to reclaim land on the Iowa side of the Missouri River which the Tribe had neither occupied nor claimed for almost a half century before instituting this litigation.

The constitutional validity of 25 USC §194, it is submitted, is a question of great significance to all pending and future litigation involving Indian land claims. The instant case shows so clearly the impact that section 194 can have on that type of litigation. It presents a very appropriate context in which to examine the constitutionality of the racial preference granted by section 194.

This Court's decisions in *University of California Regents v. Bakke*, 438 U.S. 265 (1978) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980) set forth the standards by which the constitutionality of racially preferential statutes must be reviewed. In *Bakke* the Court reaffirmed the traditional strict scrutiny standard in striking down the racial

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10. The court of appeals in its second opinion, *Omaha Indian Tribe v. Wilson*, 614 F.2d 1153, 1160, commented: "Evidence of river movements in the critical periods too often gives no more than a basis for an 'educated guess', in the words of defendant's expert witness, Dr. George Hallberg."

quota system at issue there.[11] In *Fullilove*, the Court upheld the validity of congressional legislation granting a preference to minority contractors to remedy the effects of past discrimination. The Court's opinion in *Fullilove*, however, stated that remedial legislation of the type there involved carried with it the "need for careful judicial evaluation to assure that any congressional program that employed the objective of remedying the present effect of past discrimination is narrowly tailored to the achievement of that goal". Id. at 480.

25 USC §194, it is submitted, fails to satisfy the standards of *Bakke* and *Fullilove*. There is no articulated basis in the legislative history of that statute which reveals a "substantial interest" or demonstrates that the racial classification of that statute is necessary to the accomplishment of any such interest. There is nothing to show that the statute is "narrowly tailored" to remedy "the present effect of past discrimination." In fact there is no legislative history at all upon which to rely in ascertaining the Congressional intent or purpose underlying that statute. "The legislative history here is uninformative, and executive interpretation is unhelpful with respect to this dormant statute". *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667. In the absence of legislative history or any other

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11. In *Bakke*, the court stated:

> We have held that in "order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." [citations omitted]
>
> 438 U.S. at 305.

means by which to identify a "substantial interest" or the "necessity" of the racial classification the statute must fail. The court in its opinion in *Bakke* stated:

> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. . . . Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.

438 U.S. at 307.

Moreover, the mere fact that the instant case is the first reported case to apply 25 USC §194 in the almost one hundred and fifty years since the statute was enacted belies any notion that a "substantial interest" is served by section 194 or that it is "necessary".

The court of appeals in its only comment upon the constitutionality of section 194 referred to this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974).[12] *Morton* upheld a statute granting Indians an employment preference with the Bureau of Indian Affairs. The court of appeals interpreted *Morton* as supporting the proposition that Indians may be singled out by Congress "for particular and special treatment". *Omaha Indian Tribe v. Wilson*, 575 F.2d 620, 631 n. 18.

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12. *Omaha Indian Tribe v. Wilson*, 575 F.2d 670, 631 fn. 18 (8th Cir. 1980).

Morton cannot be read so broadly. The Court in *Morton* was careful to emphasize that the employment preference at issue was a "political" preference and not a racial preference in that the special treatment was accorded to Indians not as a racial group, but as members of quasi-sovereign tribal entities.[13] Subsequent cases upholding special Indian legislation in the face of equal protection challenges also do so on the grounds that the special treatment is not based upon race but upon the unique legal status of Indian tribes. The distinction is stated in *United States v. Antelope*, 430 U.S. 641, 646 (1977).

> Both *Mancari* and *Fisher* involved preferences or disabilities directly promoting Indian interests in self-government, whereas in the present case we are dealing not with matters of tribal self-regulation, but with federal regulation of criminal conduct within Indian country implicating Indian interests. But the principles reaffirmed in *Mancari* and *Fisher* point more

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13. *Morton v. Mancari*, 417 U.S. 535, 553, 554 (1974). The limits of the type of classification approved in *Morton* was stressed again in the court's opinion in *Bakke*.

> Petitioner also cites our decision in Morton v. Mancari, 417 US 535, 41 L Ed 2d 290, 94 S Ct. 2474 (1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In Mancari, we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of the BIA is sui generis. Id., at 554, 41 L Ed 2d 290, 94 S Ct 2474. Indeed, we found that the preference was not racial at all, but "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to . . . groups . . . whose lives and activities are governed by the BIA in a unique fashion." Ibid.
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> 438 U.S. 265, 304 fn. 42

broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a " 'racial' group consisting of 'Indians' . . . ." *Morton v. Mancari,* supra, at 553 n. 24, 94 S.Ct., at 2484.

In contrast with the legislation examined and upheld in *Morton,* and *Antelope,* and also in *Fisher v. District Court,* 424 U.S. 382 (1976)[14] and *Delaware Tribal Business Comm. v. Weeks,* 430 U.S. 73 (1977)[15], 25 USC §194 draws a bright racial line. It is cast in terms of "an Indian"—literally an individual Indian—and a "white person". The preference is granted to the Indian regardless of his tribal status. The "property" referred to in the statute is not limited to tribal or reservation property. The preference granted to the Indian operates directly to disadvantage the "white person" or non-Indian where the interests of the Indian are in direct conflict with those of the "white person" or non-Indian. In no sense is the classification of section 194 "political" in nature so as to justify application of the more liberal standard of review enunciated in *Morton, Weeks, Fisher,* and *Antelope.*

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14. *Fisher* involved the exclusive jurisdiction of tribal courts under the Indian Reorganization Act, 25 USC §476, which precluded access to state courts in adoption matters involving tribal Indians.

15. *Weeks* involved Congressional legislation, 25 USC §§1291-1297, authorizing distribution of funds to certain Delaware Indians but excluding others.

Finally, 25 USC §194 does not even meet the standard of *Morton*, were that standard to apply. The preference granted in section 194 cannot be said to be "tied rationally to the fulfillment of Congress' unique obligation toward Indians." The Court, even where it has applied this more liberal standard, has cautioned that it will "scrutinize Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment", *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977). No such judicial scrutiny of 25 USC §194 has taken place in this case.

Implicit in the Court's decision in *Wilson v. Omaha Indian Tribe*, supra, is that the original purpose of the statute when it was enacted in 1834 was to provide remedies against non-Indian squatters on Indian land by offsetting any unfair advantage the non-Indian might have.[16] However, if the statute may once have had a "rational tie", that "tie" has been lost as Indians have attained much greater access to the courts and much greater resources with which to litigate land ownership claims.

As is so clearly apparent from the circumstances of the instant case, the Indian plaintiffs have been able to enlist the vast resources of the United States Department of Justice and the Bureau of Indian Affairs in litigating the title claim. The United States, in fact, is the original plaintiff and brought suit on behalf of the Tribe. 25 USC §194, by reversing the normal burden of proof in a case such as this has only served to give the United States and the Tribe a further and unconscionable advantage. Surely,

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16. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 664 (1979).

in these circumstances, the statute serves no purpose in offsetting any "advantage" presumed to exist on the side of the non-Indian claimant.[17]

There is, we submit, no principled basis upon which an automatic assignment of the burden of proof to the "white person" or non-Indian can be constitutionally justified any longer.

CONCLUSION

For the reasons stated above we request that this Cross-Petition for a Writ of Certiorari be granted so that the Court can conduct a full review of the constitutionality of 25 USC §194.

Respectfully submitted,

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17. If the purpose of 25 USC §194 is to equalize the relative positions of the Indian and non-Indian claimant in litigation over property, this purpose is hardly served by exempting a state—whose "advantage" over the Indian would seem even more decisive—from coverage under that statute, as was done in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653.

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SUPPLEMENTAL BRIEF OF CROSS-PETITIONERS

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ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF OF CROSS-PETITIONERS

This Supplemental Brief is filed pursuant to Rule 22.6 of the Rules of The United States Supreme Court in order to call the Court's attention to the Memorandum Opinion and Order of the district court, filed January 13, 1984, subsequent to the docketing on January 10, 1984, of the Cross-Petition in this case. The Memorandum Opinion and Order appear as Appendix A and B, respectively, to this Supplemental Brief.

The district court's latest action follows the remand from the court of appeals in *Omaha Indian Tribe v. Wil-*

son, 707 F.2d 304, as modified on rehearing 707 F.2d 311 (8th Cir. 1983) from which the United States has petitioned for a writ of certiorari in No. 83-952 (on the issue of improvements only) and from which the cross-petitioners have filed a Cross-Petition For a Writ Of Certiorari on the constitutionality of 25 U.S.C. § 194. The court of appeals in *Omaha Indian Tribe v. Wilson*, supra, remanded the case to the district court for further consideration on the question of ownership of portions of the Barrett Survey land claimed by the State of Iowa and ownership of certain lands within the Barrett Survey which were patented in fee by the United States in the early part of the twentieth century and claimed by cross-petitioners. The district court, on remand, has concluded that the United States and the Tribe have failed to carry their burden of proof with respect to the land claimed by Iowa and the fee patented land claimed by the cross-petitioners. The district court summarizes the effect of 25 U.S.C. § 194 on this litigation in the following words: "After eight years of litigation and appeals, land ownership in this case is not decided on the merits. All disputes involving the 2,900 acres of land are settled simply by the apportionment of the burden of proof." (App. 13).

Although the Missouri River moved in the same way over all of the Barrett Survey land in controversy at the various times in issue, Iowa will retain ownership of land claimed by it because it is exempt from application of 25 U.S.C. § 194, even though Iowa took title from the cross-petitioners. Cross-petitioners will lose the land (except the fee patented land) claimed by them because they are "white persons" to whom 25 U.S.C. § 194 applies. The cross-petitioners will retain ownership of the fee patented

land because 25 U.S.C. § 194 does not apply within the areas described by the fee patents.

Because of section 194, this case has been decided on the basis of who the litigants are rather than on the merits of their claims. This situation may be repeated in other cases where 25 U.S.C. § 194 is invoked, since placement of the burden of proof will likely be dispositive whenever the Indian claim is based upon ancient events and direct evidence is unavailable.

The district court's Memorandum Opinion and Order of January 13, 1984 are quite revealing as to the effects of a racially based burden of proof allocation and demonstrate why a complete review of the constitutionality of 25 U.S.C. § 194 should be undertaken by this Court.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C-75-4024

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROY TIBBALS WILSON, et al.,

Defendants,

No. C-75-4026

OMAHA INDIAN TRIBE, organized
Indian Tribe pursuant to
Act of June 18, 1934 (48 Stat. 984), as amended,

Plaintiff,

vs.

HAROLD JACKSON and OTIS P. PETERSON
and the DISTRICT COURT OF IOWA
IN AND FOR MONONA COUNTY,

Defendants,

No. C-75-4067

OMAHA INDIAN TRIBE, etc.,

Plaintiffs,

vs.

AGRICULTURAL INDUSTRIAL
INVESTMENT COMPANY, et al.,

Defendants.

MEMORANDUM OPINION

FILED January 13, 1984

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THE DISPUTE

The extensive history of this dispute indicates that it may die of old age before it can be successfully adjudicated. This case was filed in 1975. Originally, it involved approximately 11,000 acres of land adjacent to the Missouri River in an area known as Blackbird Bend. The issues were severed, however, and initially, the land area involved was confined by the Court to an area known as the Barrett Survey Area which contains approximately 2900 acres. After chipping away at the issues involved in this dispute, only ownership of approximately 700 acres of that land is still in question. Other remaining issues must await settlement of the title question.

Title to 2200 of the 2900 acres in dispute was ordered quieted by the Eighth Circuit Court of Appeals based on apportionment of burden of proof and a presumption of title based on the failure of a party to meet its burden. This Court must decide for the third time whether the party having the burden of proof has succeeded. Ultimately, whether any party prevails on the

merits must be settled. This Court holds that again the parties with the burdens of proof failed and therefore lose.

FACTS

For detailed discussions of the facts see the previous opinions in this dispute.[1] *Omaha III*, 707 F.2d 304 (8th Cir. 1982); *Blackbird Bend II*, 523 F. Supp. 874 (N.D. Ia. 1981); *Omaha II*, 614 F.2d 1153 (8th Cir. 1980); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 61 L.Ed.2d 153, 99 S.Ct. 2529 (1979); *Omaha I*, 575 F.2d 620 (8th Cir. 1978); *Blackbird Bend I*, 433 F. Supp. 57, 67 (N.D. Ia. 1977).

Initially, this case was a classic accretion versus avulsion case. If, on the merits, the Court found that the Missouri River moved by avulsion, then title would be quieted in the Tribe. Conversely, if the Court found movement by accretion, title would be quieted in the Defendants. Of course, a multitude of combinations were also possible. However, time and evidence proved too much. Twice this Court held that all relevant movements of the Missouri River were through accretion. Twice, the Court of Appeals characterized these findings as an "educated guess" and extremely "speculative". *Omaha I*, 575 F.2d at 648; *Omaha II*, 614 F.2d at 1160. The Court of Appeals overturned the fact findings as clearly erroneous. *Omaha II*, 614 F.2d at 1160.

After the Court of Appeals issued its mandate in *Omaha III*, this Court directed the parties to submit Post-

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[1]The Court will refer to the Court of Appeals' former decisions as *Omaha I*, *Omaha II*, and *Omaha III*. The Court will refer to its own decisions as *Blackbird Bend I* and *Blackbird Bend II*.

Appeal Findings and Conclusions. See Order filed July 18, 1983. The parties again painstakingly prepared proposed findings and conclusions. *See* Proposed Post-Appeal Findings of Fact and Conclusions of Law filed by: the State of Iowa, and the Iowa Conservation Commission; the United States; the Omaha Indian Tribe; and Wilson, Lakin, RGP, Inc. and Peterson.

The parties again point to the evidence in the record which purportedly supports their respective positions concerning accretion and avulsion. The Eighth Circuit, of course, has foreclosed any finding of accretion. The question remaining is whether the Tribe can prove avulsions by a preponderance of the evidence. The Court of Appeals disclaimed any opinion on the question:

> Although we indicated the landowners' proof was speculative whether the river moved by avulsion or accretion in both *Omaha I* and *Omaha II*, we did not assess the evidence in terms of whether the Tribe carried its burden of proof that there was avulsive movement to sustain the claim of the Tribe.

Omaha III, 707 F.2d at 309.

Reduced to its simplest terms, the issue becomes whether considering the evidence and the rulings of the Court of Appeals, the river banks were washed away particle by particle and likewise deposited elsewhere, or whether the thalweg moved by jumps. In *Blackbird Bend I*, the Court held that its finding of accretion was "supported by a preponderance of the evidence and would not be altered by any different allocation of the burden of persuasion." 433 F. Supp. at 67. The Eighth Circuit held that this was based on an erroneous definition of avulsion. However, the Court subsequently confronted the same

question in *Blackbird Bend II* after the Court of Appeals ruled on the proper definition of avulsion and again found that all river movements were accretive. 523 F. Supp. at 899. The Court of Appeals did not hold that the Court was again wrong.

The Court has reviewed the extensive Proposed Findings and Conclusions. Nothing is gained by recataloguing the evidence here. The Court will not alter its view of the evidence. The Court of Appeals has foreclosed that view becoming the foundation of a decision. As a result of this Court's view and the Court of Appeals mandates, no party can meet its burden of proving accretion or avulsion. This case then turns on the questions of law which are settled.

BURDEN OF PROOF

In *Blackbird Bend I*, the Court examined the law and held that 25 U.S.C. § 194 [Section 194] did not apply to this case.[2] 433 F. Supp. at 57, 66. The Eighth Circuit and Supreme Court agreed that this was error. *Omaha I*, 575 F.2d 620, 633; *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 61 L. Ed.2d 153, 99 S. Ct. 2429, 2538 (1979). The Eighth Circuit and the Supreme Court disagreed on which defendants were "white persons" subject to Section 194. The Eighth Circuit held that all defendants were "white

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[2]25 U.S.C. § 194 states:

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the *burden of proof* shall rest upon the white person, whenever the Indian shall make out a *presumption* of title in himself from the fact of previous possession or ownership. (emphasis added.)

persons" subject to Section 194. 575 F.2d at 633. However, the Supreme Court held that the State of Iowa, a sovereign, was not a "white person". 99 S. Ct. at 2538. The burden of proof was, therefore, shifted to all defendants except the State of Iowa.

This simple shifting of the burden of proof became critical when the Court of Appeals overturned this Court's fact findings.[3] The Tribe, as the Plaintiff in this action, would, under normal circumstances have the burden to prove its case. But, Section 194 operated to place the burden of proof on the private Defendants. The Tribe, as Plaintiff, retained its burden of proving its title to land claimed by the State of Iowa.

Omaha III further clarified the effect of Section 194. The Court of Appeals examined how Section 194 affected the burden of proof concerning the land which had been fee patented.

> Thus, as in the controversy involving the State, we deem it important that the Tribe must carry its burden of proof of rightful ownership as to this land. Because Section 194 is not applicable to these 400 acres, it is clear that the burden of proof does not rest on the landowners.

707 F.2d at 309.

The Court of Appeals in a footnote, however, delegated another factual task to the Court to be decided before assignment of the burden can be settled.

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[3]In *Blackbird Bend I*, this Court did place the burden on Plaintiffs. However, the Court also stated that this burden allocation was in no way dispositive. The Court was convinced that its findings were supported by a preponderance of the evidence. 433 F. Supp at 67.

> The record is not clear as to which lands within the disputed 700 acres were divested by the Indian Tribe and the government and which were not. The Tribe contends some of the area was allotted land relinquished back to the Tribe. *See* Plate I. Assuming the Tribe can establish that land was relinquished back to the Tribe, if the land is not otherwise claimed by the State of Iowa, title to such relinquished land should be quieted in the Tribe, as trust land as we ruled in *Omaha II*.

707 F.2d at 309, n.8.

There appears to be no dispute on which parcels of land were allotted and relinquished and on which parcels patents were issued and later cancelled. *See* Proposed Findings of the United States at p. 3-5; Proposed Findings of the State of Iowa at p. 1-3; Memorandum of Defendants Wilson, Lakin, RGP, Inc., and Peterson at p. 1-3; Memorandum of Points and Authorities of Omaha Indian Tribe at p. 15-16. The private Defendants further concede that unless patented, the lands never left trust status. Memorandum of Wilson, et al. at p. 2. However, the United States indicates that portions of some of the parcels are not contained within the Barrett Survey Area. To the extent that any portion of any of these tracts is not contained within the Barrett Survey Area, this Court states no opinion as to the disposition of such land. Because of application of Section 194 and the directive of the Court of Appeals, all allotted lands contained in the 700 acres still in dispute, which were not fee patented and which are not otherwise claimed by the State of Iowa, will be quieted in the Tribe after survey and settlement of the improvements issue as discussed later in this Opinion. Therefore, all that is left for the Court

to decide is the disposition of lands claimed by the State of Iowa and parcels of land which are described in non-cancelled fee patents.

LANDS CLAIMED BY IOWA

Because this Court in *Blackbird Bend II* determined that all movements of the Missouri River over the Barrett Survey Area were accretive, the Court concluded that the Western land must also belong to the Tribe as accretions to land ordered quieted in the Tribe by the Eighth Circuit. 523 F. Supp. at 899. In *Omaha III*, the Court of Appeals held that *Blackbird Bend II*'s reasoning, while tempting, was again erroneous. 707 F.2d at 308. The Court of Appeals held that this reasoning allowed the Tribe to bootstrap its victory via Section 194. *Id.* The Court of Appeals concluded that Section 194 could have no part in settling the controversy against the state. 707 F.2d at 308.

Basically the Court of Appeals ordered the Tribe to return to the beginning. The Tribe must prove on the merits its entitlement to the eastern Barrett Survey land before this Court's holding that the western lands were accretions would have any legal significance.[4] This, of course, demands that the Tribe show that from 1879 to 1923 the original boundary of the reservation remained unchanged because all river movements in that time period

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[4]As noted in the previous discussion in *Blackbird Bend II*, this Court stated:

> This Court does not deviate from its original judgment that the Missouri River moved over the Barrett Survey—in all relevant periods—by accretion . . . 523 F. Supp. at 899.

were avulsive.[5] The Court holds that the Tribe cannot prevail against the State of Iowa as to any lands included in the 700 acres and claimed by the state because it cannot sustain its burden of proof.

FEE PATENT LANDS CLAIMED BY OTHER DEFENDANTS

The *Omaha III* Court imposed the identical burden of proof on the Tribe concerning fee patented lands claimed by the private Defendants. 707 F.2d at 309. Therefore, the discussion in the previous section of this Opinion fully applies here. The Tribe has the burden of proving by a preponderance of the evidence that the original boundary of the reservation remained the same because of avulsive movements of the Missouri River. For the reasons previously stated, the Court holds the Tribe failed to meet that burden.

QUIETING TITLE IN THE DEFENDANTS

The foregoing findings and conclusions preclude quieting title in the Tribe to any of the 700 acres in question here, except for the land which was allotted and later relinquished to the Tribe. Does foreclosing the Tribe from a quiet title decree automatically mean that title is quieted in the Defendants?

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[5]The *Omaha III* Court stated:

> We did not hold that the Tribe established that the original boundary to the reservation remained unchanged by reason of avulsive movements from 1879 to 1923, thereby establishing continuing ownership of the Tribe in the trust land. *We deem such proof essential for the Tribe . . . to establish [its] claim to the nontrust lands.*

707 F.2d at 310 (emphasis added).

The Court of Appeals' latest opinion stated:

> We therefore remand this case to allow the district court to determine whether the Tribe has met its burden of proof so defined herein. If it holds that the Tribe failed to meet its burden, it must then determine whether the private parties and the State of Iowa are entitled to have title to the tracts of land in controversy quieted in them.

Omaha III, 707 F.2d at 310.

This open-ended and unexplained directive seems to contemplate something more for the Defendants to prevail. The State of Iowa argues that because nothing more was required of the Tribe, failure of the Tribe to meet its burden should be sufficient here. However, the State's argument ignores a critical aspect of Section 194. Section 194 operates not only to shift the burden, but also to raise a presumption of title in the "Indian". *See supra* note 2. Of course, it is now settled that the Tribe is an "Indian" entitled to the benefits of Section 194. *Omaha Indian Tribe*, 442 U.S. at 665-7, 99 S.Ct. at 2536-7. Thus, when the Court of Appeals ordered title quieted in the Tribe, it appears that its ruling was founded on the presumption afforded the Tribe by application of Section 194.

Defendants, to the extent that they succeed, prevail on the basis of imposition of the burden of proof on the Tribe. They benefit from no corresponding presumption of good title. Therefore, considering the basis of the Court of Appeals' Order, it seems proper to allow Defendants to prevail only "upon the strength of their own title rather than on the weakness of that of the [Tribe]". *See Omaha III*, 707 F. 2d at 310, n. 9.

The Court has carefully reviewed the Proposed Findings and Conclusions and Memoranda of Law submitted by the parties. It appears that the Court should determine the rights of the parties under the pleadings and evidence, and grant the proper relief by determining the better title as between the parties to the proceeding, even though a non-party may later assert a title superior to all the parties. 65 Am. Jur. 2d, *Quieting Title*, § 46.

The Tribe argues that even if it fails to meet its burden, that title cannot be quieted in any other party. *See Memorandum of Points and Authorities in Opposition to Defendants' Request to Have Title Quieted in Them.* The tribe argues that all titles are defective because they "are predicated on trespass originating in 1925 with 'squatter' Joe Kirk." Id. at p. 4

However, this argument presumes the Tribe prevailed on the merits and established that as to the Tribe, Joe Kirk was a "trespasser" or "squatter". The Tribe failed to prove entitlement to the land on the merits. At this point, the private Defendants have produced record titles. *See* Wilson Exhibits W, X, Y, Z, AA and BB. This is sufficient to quiet title as against the Tribe. *See e.g. U.S. v. Oregon*, 295 U. S. 1, —, 55 S. Ct. 610, 620 (1935); *Omaha III*, 707 F. 2d at 310, n. 9.

Likewise, the State of Iowa produced record title to the land it claims. See Exhibits M8, N8, O8 and T8. The title is not traceable to fee patents. However, it is better title than that produced by the Tribe. Therefore, the State of Iowa has presented a sufficient record to obtain a quiet title decree as against the Tribe. Because of the Court's disposition it is unnecessary to address the applicability of adverse possession.

IMPROVEMENTS

In *Omaha III*, the Court of Appeals held:

> [T]he the duty to pay for the value of improvements is an element of the government's own claim [and] a condition precedent to the right of the United States to recover . . .

707 F. 2d at 312.

Therefore, it appears that quieting title in the land claimed by the Tribe must await disposition of the improvements issue and a survey of the parcels involved. The Court in its Order filed July 18, 1983 stated:

> After the Court rules on land ownership questions, the case will be transferred back to the Northern District of Iowa for further proceedings deemed necessary to resolve the improvement issues and all remaining motions.

This Court will hear any dispute which would arise from reversal of this Opinion. Otherwise, the case will be transferred to Judge McManus in accordance with this Court's Order filed July 18, 1983.

CONCLUSION

After eight years of litigation and appeals, land ownership in this case is not decided on the merits. All disputes involving the 2900 acres of land are settled simply by the apportionment of the burden of proof. The Tribe originally won its claim to 2200 acres because of the allocation of the burden which resulted from application of Section 194. The Court of Appeals held that the Defend-

ants claiming the 2200 acres simply failed to meet their burden according to the Court of Appeals. The State of Iowa and Defendants claiming fee patent lands prevail here because of application of the burden of proof, absent the aid of Section 194. The Tribe failed to sustain its burden.

The Court happened upon an ancient legal maxim which appears appropriate here. "Idem est non probari et non esse; non deficit jus, sed trobatio." Roughly translated, "What is not proved and what does not exist are the same; it is not a defect of the law, but of proof." Black's Law Dictionary, 5th ed. (1979).

This Opinion shall constitute the Court's findings of fact and conclusions of law.

Dated this 13th day of January, 1984.

BY THE COURT:

ANDREW W. BOGUE
CHIEF JUDGE,
U. S. DISTRICT COURT

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C-75-4024

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROY TIBBALS WILSON, et al.,

Defendants,

No. C-75-4026

OMAHA INDIAN TRIBE, organized Indian Tribe pursuant to Act of June 18, 1934 (48 Stat. 984) as amended,

Plaintiff,

vs.

HAROLD JACKSON and OTIS P. PETERSON and the DISTRICT COURT OF IOWA IN AND FOR MONONA COUNTY,

Defendants,

No. C-75-4067

OMAHA INDIAN TRIBE, etc.,

Plaintiffs,

vs.

AGRICULTURAL INDUSTRIAL INVESTMENT COMPANY, et al.,

Defendants.

ORDER

(Filed January 13, 1984)

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In accordance with the Memorandum Opinion contemporaneously filed in this action it is hereby

ORDERED that title will be quieted in the Defendants as against the Plaintiffs as to land within the Barrett Survey Area for which fee patients were issued and not cancelled, when a proper survey of the parcels has been completed and Iowa legal descriptions are provided to the Court. It is further

ORDERED that title will be quieted in the United States as trustee for the Omaha Indian Tribe as against the Defendants except the State of Iowa, as to land within the Barrett Survey Area for which allottments were made but for which the patents were never issued, when a proper survey of the parcels has been completed and the improvements issue is resolved. It is further

ORDERED that title will be quieted in the State of Iowa as against the Plaintiffs as to land claimed by the State of Iowa within the Barrett Survey Area. It is further

ORDERED that this matter is hereby transfered to Judge Edward J. McManus.

Dated this 13th day of January, 1984.

BY THE COURT:
ANDREW W. BOGUE
CHIEF JUDGE

ATTEST:
WILLIAM F. CLAYTON, Clerk
By JEANA L. HAAG Deputy

No. 83-1156

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN R. WILSON, ET AL., CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1156

JOHN R. WILSON, ET AL., CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Cross-petitioners contend that 25 U.S.C. 194, which places the burden of proof on the "white person" in a suit by an Indian over title to property, violates the Due Process Clause because it creates an invidious racial classification.[1]

1. This Court has twice denied certiorari on this exact question in this case. See *Wilson* v. *Omaha Indian Tribe*, 439 U.S. 963 (1978);[2] *Wilson* v. *Omaha Indian Tribe*, 449

[1]The United States has filed a petition for a writ of certiorari in this case (No. 83-952) which raises a single question for review unrelated to the question raised by cross-petitioners herein. The factual background of this litigation is set forth in our petition at pages 2-6. See also *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979).

[2]The first question presented in No. 78-160 by cross-petitioners herein was "[w]hether Title 25 U.S. Code § 194, putting the burden of proof on 'the white person' in a suit by 'an Indian' as construed and applied by the Eighth Circuit is unconstitutional because it is invidious racial discrimination and deprives Petitioners of their property and of the equal protection of the law in violation of the Due Process Clause of the Fifth Amendment." The Court limited its grant of certiorari to Questions 2 and 3 (439 U.S. 963 (1978)).

U.S. 825 (1980).[3] Moreover, in *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 678 (1979), this Court held that "[b]y its terms, § 194 applies to the private petitioners," *i.e.*, cross-petitioners herein. Application of the challenged statute by this Court may fairly be viewed as a *sub silentio* rejection of cross-petitioners' constitutional claim.

Review of the issue tendered by cross-petitioners is no more appropriate now than it was on the prior occasions when the Court declined to consider the question. There is no conflict among the circuits. Indeed, cross-petitioners themselves state (Cross-Pet. 11) that the constitutionality of 25 U.S.C. 194 is a question of first impression.[4] Moreover, even in the instant case, the question has received little attention. The district court did not consider the constitutional question, and the court of appeals discussed the question in a footnote (*Omaha Indian Tribe* v. *Wilson*, 575 F.2d 620, 631 n.18 (8th Cir. 1978), vacated and remanded on other grounds, 442 U.S. 653 (1979)). And, although cross-petitioners rely heavily (Cross-Pet. 9-11) on this Court's decisions in *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978), and *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), no lower court has considered the constitutionality of Section 194 in light of those decisions.

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[3]One of the questions presented by cross-petitioners herein in their petition for a writ of certiorari in No. 79-1741 was "[w]hether Title 25, U.S. Code § 194, putting the burden of proof on 'the white person' in a suit by 'an Indian', is unconstitutional because it is invidious racial discrimination in favor of Indians and Indian tribes against all other races and deprives petitioners of their property and of the equal protection of the law in violation of the due process clause of the Fifth Amendment." That petition was denied *in toto* (449 U.S. 825 (1980)).

[4]Shortly before the filing of the cross-petition, one other circuit considered and upheld the constitutionality of 25 U.S.C. 194. *Begay* v. *Albers*, 721 F.2d 1274 (10th Cir. 1983). Two decided cases in the nearly 150 years of the statute's existence hardly suggest the existence of a problem requiring this Court's attention.

Accordingly, we believe it would be inadvisable for the Court to consider the constitutionality of the statute without the benefit of the views of the lower courts, and without the experience gained from the application of the statute in a variety of factual contexts.

2. In any event, as this Court stated in *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974), the resolution of cross-petitioners' due process claim must turn "on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." The Court there concluded that Congress's judgment in adopting "legislation that singles out Indians for particular and special treatment" will be upheld "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians" (417 U.S. at 554-555). In *United States* v. *Antelope*, 430 U.S. 641, 645 (1977) (footnote omitted), the Court reaffirmed this analysis, holding that:

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

Section 194, like the other special Indian legislation this Court has upheld, is directly related to the fulfillment of the United States' special obligation toward its Indian wards by protecting their most valuable property, their lands. In order to safeguard these vital Tribal resources, Section 194

rationally provides that a non-Indian claimant has the burden of proof when an "Indian shall make out a presumption of title in himself from the fact of previous possession or ownership." See Comment, *Federal Indian Burden of Proof Statute: 5th Amendment Due Process Considerations,* 19 Nat. Resources J. 725 (1979).

It is therefore respectfully submitted that the cross-petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1984

DOJ-1984-02